

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Michelle Chalmers,

Complainant,

v.

Salvation Army, Booth Brown House  
Services,

Respondent.

**ORDER GRANTING  
RESPONDENT'S MOTION  
FOR SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Steve M. Mihalchick on October 26, 1995, at the Office of Administrative Hearings, 100 Washington Square, Suite 1700, Minneapolis, Minnesota, on a Motion for Summary Disposition filed by the Respondent, Salvation Army, Booth Brown House Services ("Salvation Army" or "Respondent"). Michelle M. Lore, Horton and Associates, 700 Title Insurance Building, 400 Second Avenue South, Minneapolis, Minnesota 55401-2402, appeared on behalf of Complainant, Michelle Chalmers. Marko J. Mrkonich, Oppenheimer, Wolff & Donnelly, 1700 First Bank Building, St. Paul, Minnesota 55101, appeared on behalf of Respondent, the Salvation Army. The record closed on this motion on October 26, 1995, at the close of the hearing.

Based upon all the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

**ORDER**

IT IS HEREBY ORDERED that:

1. Respondent's Motion for Summary Disposition is GRANTED.
2. The hearing scheduled for January 9-12, 1996, is CANCELED.

Dated: November 22, 1995.

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STEVE M. MIHALCHICK  
Administrative Law Judge

### NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2, this Order is the final decision in this case. Under Minn. Stat. § 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63-14.69.

### MEMORANDUM

On June 30, 1994, Michelle Chalmers filed a charge of discrimination in employment based on sexual orientation with the Department of Human Rights. In her Charge of Discrimination, Chalmers asserted that she had been discharged from employment, that the reason for the discharge was her sexual orientation, and that the reason she was given for her discharge was pretextual. Chalmers filed a Complaint in this matter reiterating the allegations in her Charge of Discrimination and alleging that the Respondent's conduct violated Minn. Stat. Chap. 363 ("Human Rights Act"). The Salvation Army filed an Answer to the Complaint, acknowledging that Chalmers had been employed there and that she had been terminated. Chalmer's substantive allegations of discrimination were denied. The Salvation Army maintained that the employment decisions regarding Chalmers were made solely on the basis of her actions, not her sexual orientation. Respondent filed a motion requesting summary judgment.

Summary disposition is the administrative equivalent of summary judgment. Minn. Rule 1400.5500(K). Summary disposition is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn.R.Civ.P. 56.03 (1984). A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case. Illinois Farmers Insurance Co. v. Tapemark Co., 273 N. W.2d 630, 634 (Minn. 1978); Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W. 2d 804, 808 (Minn. App. 1984).

The Salvation Army, as the moving party on this motion, has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary disposition, the nonmoving party, in this case the Complainant, must show that specific facts are in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to

meet the nonmoving party's burden under Minn.R.Civ.P. 56.05. Id.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn.App. 1988). The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial. Carlisle, 437 N.W.2d at 715 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)). The nonmoving party also has the benefit of the most favorable view of the evidence. All doubts and inferences must be resolved against the moving party. See Celotex, 477 U.S. at 325; Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971); Dollander v. Rochester State Hospital, 362 N.W.2d 386, 389 (Minn.App. 1985).

Based upon the pleadings and affidavits submitted in this matter, and construing the facts in the light most favorable to the Complainant, for purposes of this motion the underlying facts in this matter appear to be as follows.

Complainant is a lesbian and was employed by the Salvation Army in January, 1991, as a child-care worker at Booth Brown House. Booth Brown House is a shelter and treatment facility for adolescent males and females, ages 11 to 17. Chalmers interviewed with Linda Weigert and Lauri Applebaum for the position. Chalmers did not disclose her sexual orientation to either interviewer at that time. Chalmers thought that Lauri Applebaum might be a lesbian when she met her at the interview.

Within two weeks of working under the supervision of Applebaum, Chalmers acknowledged her sexual orientation as being lesbian. Applebaum acknowledged to Chalmers that she too was lesbian. Chalmers Deposition at 15-18.

After working for the Salvation Army for six to eight weeks, Chalmers became a primary counselor in the girls shelter unit. In that capacity, Chalmers provided counseling and care for residents in the unit to which she was assigned. This was a full-time position. Chalmers worked full-time for Booth Brown House until she entered a graduate program at Augsburg College in September, 1992. She received a recommendation from Applebaum in her application to that program. Respondent's Exhibit 11. Upon entering the graduate program, Chalmers requested a change to part-time work. Chalmers' work schedule was adjusted to accommodate her academic schedule. She worked from 20 hours to 30 hours per week in that capacity. In July, 1993, Chalmers began work for the Wilder Foundation. At that time, Chalmers requested that her status be changed to "fill-in staff." In that capacity, Chalmers would be called upon occasionally to work shifts when unusual needs arose at Booth Brown House. Fill-in staff are not responsible for regularly scheduled shifts at the facility. Her status was changed to fill-in staff as she requested.

Chalmers' performance was reviewed in July, 1991; January, 1992; and January, 1993. Respondent's Exhibits 5, 6 and 7. Each of Chalmers' performance reviews were positive, indicating that she met or exceeded requirements in all areas. Each review made a comment that she needed to work on boundaries and work on accepting feedback regarding her work.

On October 12, 1992, Major Robert Bonfield, Community Relations and Development Secretary of the Salvation Army, distributed a memorandum encouraging opposition to a bill in the U.S. Congress characterized as "supporting homosexuality." Lorre Affidavit, Exhibit B. Attached to the memorandum was a flyer describing the bill in strongly critical language and referring to it as a "pro-sodomy bill." *Id.* Chalmers, and all other staff at Booth Brown House, received this memorandum in her office mailbox. Chalmers was offended and upset by the tone of the flyer and complained of the contents to her coworkers.

Several times during her employment, Chalmers was advised to keep her sexual orientation to herself. Applebaum, Amy Anderson, and Kersten Gerber were lesbians on staff who informed her that openly discussing her being a lesbian was not a good idea. Applebaum told Chalmers not to expect any support from the three-quarters of the supervisory staff who were lesbians working at Booth Brown House if she (Chalmers) made her sexual orientation public knowledge. Chalmers Deposition at 25-27.

In her employment at Booth Brown House, Chalmers was aware of no employee who was terminated or disciplined based on the employee's sexual orientation. The only personal knowledge Chalmers has of disparate treatment of lesbian employees is of herself and Tracy Moore being "disrespected." Chalmers' Deposition, at 38. At a diversity seminar held by the Salvation Army in the Booth Brown House cafeteria in June, 1993, Moore and Chalmers discussed openly their experiences of bias against them as lesbians. At the lunch break, a Salvation Army soldier told Chalmers that the Salvation Army should "work with gay and lesbian people . . . in the same way we do prostitutes and drug addicts" to change their lifestyle. Chalmers Deposition, at 39-40. Chalmers did not know the identity or position of the person who made the statement. The other staffers present at the conversation changed the subject.

After the diversity seminar, Chalmers' coworkers began joking with her that she was being fired whenever Chalmers received something in her mailbox that others did not receive. Chalmers did not consider the joking to be malicious or to create a hostile environment. Chalmers Deposition, at 157-58.

A few months after the diversity seminar, a ceremony was held to open a new facility at Booth Brown House. Salvation Army soldiers, community members, and facility staffers were present. Chris Harnack, the former Clinical Director, was present. Moore and Chalmers were the only "front-line" staffers present. Captain Carole Bacon stated "I'd like to introduce all the Brown House staff here today" and she proceeded to recognize by name the custodial staff, the foreman of the construction crew, a member of that crew, and Harnack. Chalmers Deposition, at 45-46. Bacon did not recognize either Moore, who was no longer on staff at Booth Brown House, or Chalmers, who was on staff there. Chalmers felt snubbed by the failure to introduce her by name. *Id.* at 46.

While Chalmers was working on the girls shelter unit in 1992, she received a note from one of the residents. This note referred to Chalmers as a "pussy-whipped Jew bitch." Chalmers Deposition, at 48-49. Chalmers passed the letter on to

Hennessey and Applebaum and neither responded to the letter. Chalmers took the insults in the note to refer to her being a lesbian. Chalmers believed that the resident involved should have been counseled about inappropriate language. Chalmers believed that staff should have been counseled about how to respond to such insults. Id. Chalmers did not ask for any response by her supervisor or others. Chalmers Deposition, at 65-66.

On November 6, 1993, Chalmers was engaged in one-on one counseling of a female resident in Unit 2. Another female resident came into the room. The two residents had been engaging in conduct suggesting a relationship between them. One of the residents asked Chalmers if it was true that when two women were having sexual relations, one of the two would have to “act like a guy.” Chalmers Deposition, at 92. Chalmers responded with a short lecture on gender roles and that there was not necessarily a male role in a lesbian relationship. Chalmers was asked by the residents if she was a lesbian. Chalmers inquired into the question and the residents responded that a staff member had said there was a lesbian on staff who could probably answer some of the sexuality questions that had come up. Chalmers had not been mentioned by name. Chalmers Deposition, at 93-94. Chalmers believed that she had been “outed” by the comment. Id. Chalmers did not complain of this to any supervisors at Booth Brown House.

On November 11, 1993, Mary Booker, the staff worker on duty at Unit 2, called Chalmers and asked if she would assist in a situation that had arisen at the unit. The need for additional staff arose due to a situation between three female residents of the unit. Two of the residents had been engaging in sexual conduct and the third was threatening to disclose the relationship to the other residents in the unit. The two residents in the relationship were the same two who had asked the questions of Chalmers on November 6. Booker told her one of the two residents was getting “freaked out” and making threats to run away and hurt herself. Booker and Chalmers took this to mean that the resident was considering suicide. Chalmers Deposition, at 97. Chalmers refused to come in, absent approval from a supervisor. Booker asked her supervisor, Rachel Ankeny, if Chalmers could be called in to work that evening. Ankeny initially demurred, saying “it has nothing to do with Michelle’s sexual orientation” and Chalmers “was not scheduled to work.” Booker Affidavit, at 2. Ankeny also commented, “people are born a certain way and cannot be convinced one way or the other.” Id. Ankeny expressed discomfort with calling in Chalmers and commented that other supervisors would do things differently, but gave approval to call in Chalmers for assistance. Id., at 3.

Chalmers came to Booth Brown House and stayed downstairs to avoid creating a disturbance on the unit. The area was under renovation and was not amenable to counseling. One of the residents came down and began discussing the situation with her. After a short while, the resident disclosed that she had been engaging in sexual behavior with another resident. The resident also suggested that she was in the “wrong body” (meaning she felt more like a male than a female). Chalmers Deposition, at 99-101. Booker and the other two residents involved in the conflict came downstairs from the unit. Rather than discuss the situation there at Booth Brown House, Booker,

Chalmers, and the three residents left the facility in the facility van and went to a local fast-food restaurant. Neither Chalmers nor Booker informed a supervisor they were leaving or where they were going.

At the restaurant, the staff and residents discussed the situation experienced by the residents. At some point, the resident who had been threatening to run or hurt herself went to the bathroom. She was not accompanied by either of the staff persons present. After the resident returned to the table, another resident went to the bathroom. After the situation was resolved, the residents and staff returned to Booth Brown House. Booker told Chalmers that she (Booker) would do the charting on the incident. Chalmers went home. Booker failed to chart the incident. No one informed the residents' therapist that the meeting had taken place or what was discussed. No staff member reported the sexual contact between the residents to any agency.

Also on the evening of November 11, another resident in Unit 2 began "acting out." Hennessey Deposition, at 28. Wendy Hennessey, a supervisor for Booth Brown House, was the on-call staff supervisor that evening. Hennessey inquired of the staff remaining at the facility as to the whereabouts of the back-up person for Unit 2. Booker was the back-up person. Hennessey was told that Booker was off the grounds with two residents. When she inquired as to where they were, no one knew. Hennessey Deposition, at 28. No one could tell Hennessey what problem had caused the trip. Id.

On November 12, 1993, Hennessey inquired of Ankeny as to what had happened the previous night. Ankeny described the situation to Hennessey. Hennessey criticized the failure to go through the on-call supervisor, the failure to chart the incident, the failure to notify the residents' therapist of the incident, and that the meeting took place off of the facility grounds. Hennessey Deposition, at 29-33.

Hennessey was a unit supervisor at Booth Brown House. She had been a child care worker there from 1987 to 1991, and a supervisor since 1991. While not a supervisor of Chalmers, she observed her work almost daily and noted boundary difficulties. Complainant's maintenance of boundaries was a recurrent theme in the weekly staff meetings held between supervisors.

Vida Peterson began work with the Salvation Army at Booth Brown House as a Child Care Worker. She became a supervisor with the title of Intake Coordinator in October, 1991. At the weekly supervisor meetings, Peterson heard Applebaum consistently mentioning problems with Chalmers' boundaries with residents. Applebaum complained of Chalmers becoming too close to residents and Chalmers not taking criticism of that behavior well. Peterson described Applebaum's reaction to the ongoing boundary issues as one of "extreme frustration." Peterson Deposition, at 18. All of the supervisors believed that Chalmers' skills with the residents were good in the manner of discipline and awareness of the residents' feelings.

Peterson described her view of Chalmers' approach to resident care and her actions in the November 11 incident as follows:

I see Michelle as very dedicated to kids. I see her as believing that she knows what's best and that I see Michelle as having a very, very difficult time hearing that maybe she didn't always know what's best and can learn from what other people are seeing.

Peterson Deposition, at 46.

Peterson, Hennessey, Applebaum, and Ankeny met to discuss the November 11 incident. Mike Wilson, Clinical Director, had input in the decisions arrived at but was not present at the meeting. No Salvation Army officers were at the meeting. Hennessey expressed concern that she, as the on-call supervisor on duty that evening, was not contacted regarding the inclusion of Chalmers in working with the two residents. Hennessey also objected to Ankeny not informing her of the movement of the residents and staff off of the grounds. The lack of knowledge as to where the staff and residents went was also a concern to Hennessey. She criticized the lack of charting done after the November 11 incident. The residents' therapist had made known to Booker that any interventions should be made known to therapist. No such information had been passed on to the therapist.

The group concluded that to keep Chalmers on staff at Booth Brown House, more supervision of Chalmers was required. As fill-in staff, there was little or no opportunity for direct supervision. Applebaum expressed her unwillingness to provide the supervision necessary and related that the boundary problems apparent in the November 11 incident had been ongoing during Chalmer's employment with Booth Brown House. Hennessey, Applebaum, and Ankeny decided that Chalmers should be terminated.

Hennessey called Chalmers to have her come in for a meeting with Hennessey, Applebaum, Ankeny, and Peterson. The stated purpose of the meeting was to discuss Chalmer's status. The true reason for the meeting was to inform Chalmers of her termination. A meeting was scheduled for November 19, 1993. Chalmers spoke to Peterson and informed her that a friend of Chalmers' would be attending the meeting. Peterson told Chalmers that the meeting was not a "bashing." Chalmers took the comment to mean that this was not a "gay bashing." Peterson called Chalmers back and told her that Chalmers could not have another person there with her. Chalmers told Peterson that she wanted to tape the meeting and Peterson responded that Chalmers could do so.

When Chalmers arrived for the meeting, Peterson informed Chalmers that she could not tape the meeting. Chalmers became upset and did not attend the meeting. Chalmers was given a copy of the memorandum terminating her employment from the Salvation Army. The memorandum gave as reasons for termination:

As supervisors at The Salvation Army Booth Brown House Services, we have great concerns regarding your role as a fill-in child care worker, your role in a recent critical incident, and its relationship with your ongoing issues around professional boundaries.

As a fill-in child care worker, on your own time,<sup>[1]</sup> you stepped outside of your role, and involved yourself in a critical incident. In doing so, you failed to operate within the realm of the clients' treatment plans. Because you failed to communicate, either verbally or in writing, with the clients' Therapist, Treatment Team or Unit Supervisor after the incident, you made it impossible to integrate any interventions or strategies into the clients' treatment plans.

We believe that maintaining appropriate ethical and professional boundaries in one's role with clients is imperative. We view your behavior as a blatant violation of your role as a fill-in staff, as well as the Social Worker Code of Ethics.

Because of the nature of the position of the fill-in child care worker, you are not provided the type of supervision necessary for you to address these issues, both on an immediate as well as an ongoing basis. Based on these factors, we have decided to end your employment here.

We recognize that, as a Wilder ISP worker, we will continue to have a professional relationship. That relationship will include all basic expectations of outside agency professionals.

We feel that, as your relationship with Brown House is ending, your connection with past residents is outside Brown House. Therefore, we will return any mail to it's sender, and inform callers you are not a Brown House employee.

Complainant Exhibit D.

Mary Booker received a counseling statement from Ankeny on November 30, 1993, arising from the November 11 incident. That statement reads:

1. I have made the following observation of employee's conduct: Mary has been having difficulty working with the treatment team in terms of following/integrating ideas into residents' treatment plans and cooperating with supervisory/administrative staff.
2. I have informed employee of the following standards that will be expected from her/him in the future: Mary will be expected to present her ideas to those who share responsibility for the residents' treatment (e.g. treatment therapist supervisor). Mary will be expected to communicate any pertinent information regarding residents' treatment and cooperate with the treatment team without signs of hostility.
3. These standards are important because of the following impact on the work environment: It is imperative that residents' treatment be managed collaboratively.

4. I have advised the employee of the following consequences if he/she fails to follow the above standards: A written warning will be added to her personnel file.

5. These matters will be reviewed within 14 days.

#### Respondent's Exhibit 9.

Ankeny was asked on or before November 24, 1993, for her resignation. She was allowed to resign effective January 17, 1994. Complainant Exhibit F. A memorandum by Captain Bacon identified a "critical incident" mishandled by Ankeny. The memorandum documented a conversation between Clinical Director Michael Wilson and Captain Bacon. The critical incident and subsequent employment action was described as follows:

There was an incident involving a Primary Counselor and a Fill-In staff, making plans for therapeutic interventions which were outside the bounds of what had been suggested by the Therapist, done away from the facility by the fill-in when she was not working, not properly documented and therefore not properly integrated into the treatment plans of the residents. Rachel new [sic] of the intervention and gave her approval.

Due to her poor choices in this incident, and her demonstrated inability to provide direction for direct care staff in a firm way, the decision was made to ask for her resignation.

Immediate termination was discussed and ruled out due to her lack of experience when we hired her, and our responsibility in hiring her with such limited experience.

#### Respondent's Exhibit 10.

The Human Rights Act specifies that, except under limited circumstances, it is an unfair employment practice for an employer to discharge an employee because of sexual orientation or otherwise discriminate against an employee because of sexual orientation with respect to "hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." Minn. Stat. § 363.03, subd. 1(2) (1992).

Minnesota courts have often relied upon federal case law developed in discrimination cases arising under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.) in interpreting the Human Rights Act. Relevant Minnesota case law establishes that plaintiffs in employment discrimination claims arising under the Human Rights Act may prove their case either by presenting direct evidence of discriminatory intent or by presenting circumstantial evidence in accordance with the analysis first set out by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). Feges v. Perkins Restaurants, Inc., 483 N.W.2d 701, 710 and n. 4 (Minn. 1992); Sigurdson v. Isanti County, 386 N.W.2d 715, 719 (Minn. 1986); Danz v. Jones, 263 N.W.2d 395, 399 (Minn. 1978).

The approach set forth in McDonnell Douglas consists of a three-part analysis which first requires the complainant to establish a prima facie case of disparate treatment based upon a statutorily-prohibited discriminatory factor. Once a prima facie case is established, a presumption arises that the respondent unlawfully discriminated against the complainant. The burden of producing evidence then shifts to the respondent, who is required to articulate a legitimate, nondiscriminatory reason for its treatment of the complainant. If the respondent establishes a legitimate, nondiscriminatory reason, the burden of production shifts back to the complainant to demonstrate that the respondent's claimed reasons were pretextual. McDonnell Douglas, 411 U.S. at 802-03; see also Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 623 (Minn. 1989); Hubbard v. United Press International Inc., 330 N.W.2d 428 (Minn. 1983).

Indirect proof of discrimination is permissible to show pretext, since "an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." Haglof v. Northwest Rehabilitation Inc., 910 F.2d 492, 494 (8th Cir. 1990), quoting MacDissi v. Valmont Industries Inc., 856 F.2d 1054, 1059 (8th Cir. 1988). The burden of proof remains at all times with the complainant. Fisher Nut Co. v. Lewis ex rel. Garcia, 320 N.W.2d 731 (Minn. 1982); Lamb v. Village of Bagley, 310 N.W.2d 508, 510 (Minn. 1981).

The law is clear that the three-part McDonnell Douglas analysis is to be applied in deciding summary judgment motions involving claims alleging disparate treatment in violation of the Human Rights Act. Albertson v. FMC Corp., 437 N.W.2d 113, 115 (Minn.App. 1989), citing Sigurdson v. Isanti County, 386 N.W.2d 715, 719-22 (Minn. 1986); see also Rademacher v. FMC Corp., 431 N.W.2d 879, 882 (Minn.App. 1988); Shea v. Hanna Mining Co., 397 N.W.2d 362, 368 (Minn.App. 1986). The U.S. Court of Appeals for the Eighth Circuit has cautioned that "[s]ummary judgments should be sparingly used [in cases alleging employment discrimination] and then only in those rare instances where there is no dispute of fact and where there exists only one conclusion ... All the evidence must point one way and be susceptible of no reasonable inference sustaining the position of the non-moving party." Johnson v. Minnesota Historical Society, 931 F.2d 1239, 1244 (8th Cir. 1991)(relying upon Hillebrand v. M-Tron Industries Inc., 827 F.2d 363, 364 (8th Cir. 1987), cert. denied 488 U.S. 1004 (1989); and Holley v. Sanyo Manufacturing, Inc., 771 F.2d 1161, 1164 (8th Cir. 1985).

Since Johnson v. Minnesota Historical Society was decided, the Minnesota Supreme Court has considered the application of summary disposition in discrimination cases and stated:

We take this opportunity to express our disapproval of the court of appeals' sweeping statement that summary disposition is generally inappropriate in discrimination cases. Johnson [v. Canadian Pacific Ltd.], 522 N.W.2d 391. That is not the law in Minnesota.

Dietrich v. Canadian Pacific Railroad, Ltd., 536 N.W.2d 319, 327 (Minn. 1995)(footnote 9).

The summary disposition standards apply no differently to discrimination matters than to any other type of matter.

The elements of a prima facie case of discrimination vary depending upon the type of discrimination alleged, and must be tailored to fit the particular circumstances. Ward v. Employee Development Corp., 516 N.W.2d 198, 201 (Minn.App. 1994). The Complainant's claims in the present case fall into the primary category of different treatment taken against an employee on the basis of that employee's sexual orientation. Chalmers alleges that a reason that she was discharged was her sexual orientation.

In order to demonstrate a prima facie case of sexual orientation discrimination in discharge or terms and conditions of employment, the Complainant must show she is member of a protected class, she is qualified for the position, an adverse action was taken against her, and such adverse action was not taken against similarly situated persons with Complainant's sexual orientation. See Prince v. United Parcel Service, 845 F.Supp. 835, 840 (N.D.Ala. 1993)(citing Goldstein v. Manhattan Indus., 758 F.2d 1435, 1442 (11th Cir.), cert. denied, 474 U.S. 1005, 106 S.Ct. 525, 88 L.Ed.2d 457 (1985)).

Based upon the application of the standards set forth above and construing the evidence in a light most favorable to the nonmoving party, the Administrative Law Judge concludes that Chalmers has presented sufficient evidence to support a prima facie case of sexual orientation discrimination. Chalmers is a lesbian, she was discharged from employment, and another person connected to this matter who is not a lesbian remained employed with Respondent.

With the prima facie case being established, the burden is on the employer to identify a legitimate, nondiscriminatory reason for the adverse employment action. Hasnudeen v. Onan Corp., 531 N.W.2d 891, 893 (Minn. App. 1995), citing Sigurdson v. Isanti County, 386 N.W.2d 715, 720 (Minn. 1986). The Salvation Army asserts that the only reasons for Complainant's discharge are the actions of Complainant in caring for two residents and the difficulty of supervising Complainant in her current position. The objectionable actions in caring for the two residents were identified as removing emotional residents from the residence, not properly supervising the residents when at a local fast-food restaurant, failing to chart the discussions with the residents, failing to relay the content of the discussion to the residents' therapists, and failure to report the sexual contact between the residents to either superiors or the appropriate governmental agency.

The reasons advanced by the Salvation Army are legitimate, nondiscriminatory reasons for terminating an employee. Where this prong of the McDonnell Douglas test is met, the employee can still succeed in the claim by demonstrating that the asserted reason is mere pretext for discrimination. The showing of pretext can be made by

demonstrating the reasons are not the true reason or the employer's asserted reason is not worthy of credence. Hasnudeen, at 893, citing Feges v. Perkins Restaurants, Inc., 483 N.W.2d 701, 711 (Minn. 1992).

To demonstrate pretext, the Complainant must have more than an allegation that the reasons given for an employment action are not the true reasons. In a hearing on discrimination, if the reasons asserted do not support the actions taken a judge may infer that the employer is providing a mere pretext for discrimination. St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2749 (1993). On a motion for summary disposition, any inference that can be made must be made in favor of the nonmoving party. Where any inference can be made under this Motion, the Judge must infer that the reasons given are pretextual. Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124 (7th Cir. 1993).

Complainant asserts that the objections toward care of the residents are pretextual. She asserts that her coworker, Mary Booker, was responsible for the charting and notification issues; that Complainant's participation was approved by a supervisor, that removing residents from the residence is normal practice, and that close supervision of the residents was not required.

Complainant asserts that the alleged problems with boundaries, cited as the reason for termination by those who made the decision, did not exist. In the Complainant's view, the issue of boundaries is a genuine issue of material fact. Complainant has introduced affidavits from the former Clinical Director, Chris Harnack, and other former staff members, Mary Booker, Tracy Moore, and Elizabeth Nelson, to support the assertion that she had no boundary problems. The opinion of a coworker is not dispositive on the issue of the reasonableness of an employer's evaluation of an employee. Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125 (7th Cir. 1993). The issue in this matter is not the presence or absence of boundary problems. The issue is whether the supervisors were acting in good faith when they decided to terminate Complainant, or whether the decision was motivated by illegal discrimination.

Complainant was working in a position that ruled out the possibility that she could be supervised in the performance of her "day-to-day" duties. At the supervisors' meeting concerning the incident, the supervisory issue was discussed and Complainant's supervisor stated that Chalmers had boundary problems from the beginning of work for Booth Brown House and she (the supervisor) could not provide the supervision necessary to correct the boundary problem identified. This is a legitimate, nondiscriminatory reason for discharging Complainant.

Regarding the charting and notification issues, the Complainant asserts that Booker was responsible for charting. However, Chalmers had a one-on-one discussion with a resident that Booker could not have charted (since Booker was not there). Booker could not have notified that resident's therapist of the contents of that one-on-one session, since Booker had not been told what was said. Failures in charting and notification are legitimate, nondiscriminatory reasons for discharging Complainant.

On a motion for summary judgment, all inferences must be taken in favor of the nonmoving party. There is no assumption that an employer moving for summary disposition has acted in good faith when that good faith is a genuine issue in the matter. However, the nonmoving party must have more than an allegation that the employer's action was pretext for discrimination. There is no evidence that the employer's action was pretextual. There is no evidence that persons other than program staff were involved in the decision to terminate Chalmers. One stated reason for discharge, poor boundaries, was identified throughout Complainant's employment. The only evidence of any general discriminatory beliefs runs to officers of the Salvation Army. None of those persons were involved in the employment decision and there is no evidence that the supervisors acted out of some fear of or influence by the officers.

In discrimination cases generally, courts are frequently admonished not to act as a "super-personnel department" or "determine whether the employer exercised prudent business judgment." Heerdink v. Amoco Oil Co., 919 F.2d 1256, 1260 (7th Cir. 1990)(citing LaSalle Nat. Bank v. County of Du Page, 856 F.2d 925 (7th Cir. 1988), cert. denied, 489 U.S. 1081, 109 S.Ct. 1536, 103 L.Ed.2d 840 (1989), quoting Dale v. Chicago Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986) cert. denied, 479 U.S. 1066, 107 S.Ct. 954, 93 L.Ed.2d 1002 (1987)). No connection was shown between the persons holding views hostile to homosexuals and the persons who decided to terminate Complainant. Thus, Complainant has asked the Judge to infer from the employment decision that was made that discrimination was somehow the basis for that decision. That inference can be made to support a prima facie case, but it is insufficient to establish pretext. Assessing whether or not Complainant had a boundary problem, whether Complainant was responsible for charting, and whether off-site interventions were ordinary occurrences are all decisions that an employer makes in like circumstances. Two other employees were disciplined for the same incident cited as the basis for Complainant's termination. A nondiscriminatory reason was cited as the reason the other staffer was not discharged. There is no evidence to the contrary.

Complainant has asserted she was treated differently than the other persons involved in the November 6 incident. Chalmers was terminated. A supervisor was forced to resign over same incident. As carried out in this matter, the resignation is equivalent to a discharge. The only differential treatment was in the failure to discharge the other staff worker involved in providing care that evening. The supervisors who made the employment decisions concluded that, with supervision, the retained staff member could provide appropriate care. That conclusion is consistent with the events that occurred on November 11. No evidence has been introduced to indicate that the supervisors were considering sexual orientation when they decided to retain the full time staffer. The forced resignation of the supervisor who would otherwise have been supervising the staffer supports the reason given as the actual reason for taking the employment action and does not give rise to an inference that discrimination was involved.

The only times when homosexuality was mentioned in Complainant's employment fall into two groups. General statements opposed to homosexuality on the part of the Salvation Army are one category. Specific statements by two supervisors, a

resident, and two Salvation Army officers fall into another category. The general statements by the Salvation Army are that homosexuality is deviant behavior and homosexuals must be “helped” to become heterosexual (or at least control their homosexual conduct). While these statements are offensive to some people, there is no indication that the Salvation Army makes employment decisions on the private sexual behavior or orientation of applicants or employees. The inference that sexual orientation was not a basis for employment decisions is supported by the hiring and continued employment of other lesbians on the staff at Booth Brown House and the failure to act to discharge Complainant when she publicly disclosed her sexual orientation at a diversity seminar. The evidence adduced indicates that making one’s sexual orientation a matter of public discussion is not encouraged. This does not establish an inference of pretext.

Two statements by Salvation Army officers are cited as evidence of pretext. One is by a person attending the diversity seminar and the other is by an officer speaking to another Salvation Army officer. There is no evidence as to the identity of either person and no evidence that either person was involved in the employment decision regarding Complainant. These statements do not create an inference of pretext in the decision.

Two statements by supervisors are cited as supporting an inference of pretext. One is the statement by Ankeny when Booker called for approval of Chalmers participation. The other is the statement by Peterson that the employment action was not a “bashing.” If Ankeny was motivated by discrimination on the basis of sexual orientation, Ankeny could have refused Chalmers’ participation. Rather, she approved that participation. There is no inference that can be supported other than that Peterson was attempting to assure Chalmers that the action by the supervisors was not motivated by sexual orientation. Both Ankeny and Peterson were aware of Chalmers’ outspoken attitude concerning sexual orientation discrimination. To accept either statement as a basis for inferring discrimination, the meaning of the statements must be taken as the exact opposite of what was said. Absent some extrinsic evidence that the statements were false or self-serving, neither statement can be the basis of an inference of discrimination.

Complainant cites the lack of response to a note from a resident as evidence of discrimination. The note referred to Chalmers as a “pussy-whipped Jew bitch.” Chalmers showed the note to two supervisors. One of the supervisors shown the note is a lesbian. Complainant did not ask for any response to the note. Chalmers has indicated that she was very popular with the residents she worked with. Chalmers Deposition, at 99. The note contains three insults, one concerning attitude (and possibly gender), another concerning ethnicity or religion, and one which is, taken in the light most favorable to the Complainant, relating to her sexual orientation. Without a request for some action, an otherwise popular staff member could reasonably be expected to weather one critical comment from a resident. The incident is too ambiguous to support an inference of discrimination.

A perceived snub was cited by Complainant as evidence of discrimination when Captain Bacon failed to recognize her as a staff member at the opening of a renovated

facility. Without evidence of Captain Bacon's participation in, or influence on, the decision to terminate Complainant, the "snub" does not create an inference of pretext in that decision.

Chalmers has also alleged that the facts described above constitute different treatment during employment on account of sexual orientation. None of the incidents alone or collectively amount to differential treatment.

Based upon the evidence presented, and taking that evidence in a light most favorable to Complainant, there is no basis on which to infer that the Salvation Army discharged Complainant on the basis of her sexual orientation or that she was treated differently or subjected to different terms and conditions of employment because of her sexual orientation. There are no genuine issues of material fact that remain for hearing and summary disposition is appropriate in this matter.

S.M.M.

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<sup>[1]</sup> As stated previously, Chalmers was called in, she was not on her "own time".